Petition

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No.

In the Supreme Court of the United States

October Term, 1981

RAYMOND W. ZWEGO, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an "application for a duplicate title to a motor vehicle" is a "security" within the meaning of Title 18 U.S.C. § 2311 so that its interstate transportation is proscribed under the provisions of Title 18 U.S.C. § 2314, and

Whether a penal statute is to be strictly construed against the prosecutorial authority and any doubt resolved in favor of the accused; or can the same be liberally construed?

2. Whether *one* telephonic communication to an employee of a federally insured bank, in which two different names are given, can liable petitioner to two separate convictions and two consecutive sentences under the applicable provisions of Title 18 U.S.C. § 1014.

3. Whether the element of scienter is a separate and distinct element of the crime of fraud so that it must be independently proven beyond a reasonable doubt in order to sustain a conviction of violations of Title 18 U.S.C. § 1014.

4. Whether petitioner's oral statements made telephonically to an employee of a federally insured bank, constitute an "application" as that term is used in Title 18 U.S.C. § 1014.

5. Whether the opinion of the Court below approves loan procedures for federally insured banks which procedures, if followed, would constitute a violation of the provisions of Title 15 U.S.C. § 1681, et seq., commonly known as the FAIR CREDIT REPORTING ACT.

6. Whether the United States District Court for the District of Kansas had the jurisdiction to try the defendant-petitioner, convict and sentence him to two separate consecutive sentences for petitioner's doing *one* act which he did entirely within the boundaries of the State of Missouri.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Raymond W. Zwego, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 9, 1981.

OPINION BELOW

The Opinion of the Tenth United States Circuit Court of Appeals is reported at 657 F.2d 248 as *United States v. Raymond W. Zwego, Jr.*, and the same is fully set out in the appendix hereto.

JURISDICTION

The judgment of the Tenth United States Circuit Court of Appeals was entered on June 9, 1981. A timely petition for rehearing or in the alternative for transfer to the Court *en Banc* was denied on September 22nd 1981. A timely motion to stay the mandate of the Circuit Court of Appeals was granted on October 1st 1981 until November 1st 1981 in order for petitioner to file this petition to this United States Supreme Court. This petition is filed within 60 days of the Tenth Circuit's entering of its order denying rehearing. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §§ 2311, 2314.

Title 18 U.S.C. § 1014.

Title 18 U.S.C. § 3237.

Title 15 U.S.C. § 1681, 1681(a), (b), (d), (n).

Rule 18, Federal Rules of Criminal Procedure.

Kansas Statutes Annotated 50-701, 702, 703, 705, 715, 720.

Kansas Statutes Annotated 8-171.

Kansas Statutes Annotated 84-2-403.

§ 400.2-403 Vernons Annotated Missouri Statutes.

STATEMENT OF THE CASE

This petition is brought as a result of an affirmance of petitioners indictment by the federal grand jury at Kansas City, Kansas, conviction and sentencing for the alleged violation of Title 18 U.S.C. §§ 2311 and 2314 (one Count), wherein it was charged by indictment that petitioner caused the interstate transportation of a falsely made and forged security, to wit: an application for a duplicate certificate of title to a motor vehicle, and for two counts of allegedly violating the provisions of Title 18 U.S.C. § 1014, which charged that defendant-petitioner made false statements to an employee of a federally insured bank concerning two potential loan applicants who were allegedly customers of petitioner's used car business.

The parties (petitioner and the government) entered into written stipulations of fact, and the case was tried to the Bench solely on such stipulations, they being the only evidence in the case from which the Trial Court, the Hon.

Earl E. O'Connor, Judge of the United States District Court for the District of Kansas, could conclude the guilt or innocence of the petitioner. (The entire stipulations are set out in toto as Appendix A-3.)

The trial court found the defendant guilty of Counts 3 and 4 (the false statement counts) and of Count 9 (the interstate transportation of a false and forged security count). All other counts of what had been a twelve count indictment were dismissed by the Court at the governments request. The trial court sentenced the petitioner to the custody of the Attorney General for a period of two (2) years on each of Counts 3 and 4 and three (3) years on Count 9, with the sentences to run consecutively to each other, for a total of seven years.

Defendant-petitioner appealed the decision to the United States Court of Appeals for the Tenth Circuit, and, as aforesaid, a three Judge panel of that Court affirmed, The Hon. William Holloway, Judge, dissenting as to Count 9 (the interstate transportation of a forged and falsely made security count).

Petitioners Motion for Re-hearing or in the alternative for transfer to the Court, en Banc, was overruled on Sept. 22nd 1981. The Opinion of the United States Circuit Court of Appeals for the 10th Circuit is published and reported as *United States v. Zwego*, 657 F.2d 248 (10th Cir. 1981). (The full text thereof appears at Appendix A-1).

Pursuant to a timely motion made to stay the mandate in the cause the 10th Circuit Court of Appeals entered an order staying the same for the period of thirty (30) days, in which time the petitioner is to have this Petition for Writ of Certiorari filed with the Clerk of this United States Supreme Court.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Conflicts With Other Circuit Courts of Appeal As to What Is a "Security" Within the Meaning of Title 18 U.S.C. §§ 2311 and 2314, and Its Opinion Liberally Construes a Criminal, Penal, Statute in Derogation of the Rule of Judicial Construction Which States That a Penal Statute Is Strictly Construed Against the Government and in Favor of the Defendant, As Has Been the Consistent Rule of This Court.

On the 8th day of November 1979, the Hon. Earl E. O'Connor, Judge of the United States District Court for the District of Kansas, held a hearing on motions filed in cause No. 79-20062-01, *United States of America v. Raymond W. Zweno, Jr.* In ruling on a motion to dismiss certain counts of a twelve count indictment charging the defendant-petitioner with causing the interstate transportation of a,

> "Falsely made and forged security, to wit: a State of Kansas Department of revenue, Division of Vehicles Application for Duplicate Title for a 1977 Dodge, VIN: B-32BE7X157136; all of which was done in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2."

The trial judge stated: "Probably the only question of any real significance raised in all these motions maybe is on the question here of the definition of a security. I can see that perhaps there is room for difference of opinion there." Notwithstanding the doubt the trial court convicted the defendant-petitioner of Count 9 of the indictment (quoted above). The entire trial was on a written stipulation of facts agreed to between the parties, and the said trial was to the bench a jury being waived by defendant-petitioner. (A-3).

On appeal, the United States Circuit Court of Appeals for the Tenth Circuit (a three Judge Panel) ruled that the "Application for Duplicate Title" was a "security" within the meaning of Title 18 U.S.C. §§ 2311 and 2314. The Hon. William Holloway, Judge, filed a strong dissent on the point. He, like his brother Oklahoman on the Tenth Cir. Court of Appeals in 1930, Judge Cotteral, argued for the rule of strict construction of Criminal Statutes and opposed reading into criminal laws things which are simply not there. See dissenting opinion of Holloway in *United States v. Zwego*, 657 F.2d 248 (10th Cir. 1981), and dissenting opinion of Cotteral in *McBoyle v. United States*, 43 F.2d 273, 274 (10th Cir. 1930).

The *McBoyle* (*supra*) case dealt with the "National Motor Vehicle Theft Act" Title 18 U.S.C. § 408 (the precursor of the law here in question). That law (in 1931) defined a motor vehicle as "an automobile, automobile truck, automobile wagon, motor cycle, *or any other self-propelled vehicle not designed for running on rails.*" In that case the trial court and the 10th Circuit Court of Appeals ruled that an airplane was within the definition of a motor vehicle. *McBoyle v. United States*, 43 F.2d 273.

This United States Supreme Court granted a Writ of Certiorari in the *McBoyle* (*supra*) case and overruled the opinion of the 10th Circuit. *McBoyle v. United States*, 283 U.S. 25 (1931). Mr. Justice Holmes delivered the opinion of the Court holding that:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning

> fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. *United States v. Thind*, 261 U.S. 204, 209."

McBoyle v. United States, 283 U.S. 25, 27.

In reaching its decision that an "application for duplicate title" is a "security" the Tenth Circuit Court of Appeals had to read into the law a number of things which are not there, to wit: if something is "usable as an intermediate step in obtaining the actual certificate of title. . . ." if something has "value to a forger" then it is a "security" within the meaning of that term in Title 18 U.S.C. §§ 2311 and 2314. A reading of the provisions of 18 U.S.C. 2311 and 2314 does not even reveal an allusion to such a definition, and petitioner is at a loss to discover any case so holding. The 10th Circuit also completely overlooks the Kansas Duplicate Title law, Kansas Statutes Annotated 8-171, which states in pertinent part:

> "In the event that any license plate, certificate of title or registration receipt shall be lost, mutilated or shall have become illegible, *the person who is entitled thereto* shall make immediate application for and obtain a duplicate therefore, . . ." (Emphasis supplied).

It is apparent that the above does not say that the "owner" shall obtain a duplicate title, it shall be obtained by "the person who is entitled thereto". Reading the above together with K.S.A. 84-2-403(2)(3), being part of the Uniform Commercial Code,

> "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

and

> " 'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law."

The provisions of the Missouri Uniform Commercial Code § 400.2-403 V.A.M.S. read exactly the same. This, taken together with the undisputed fact that petitioner had "entrusted" to him the vehicle described in Count 9 of the indictment in this case, conferred upon petitioner the legal right to make the application for duplicate title here in question.

And, even assuming, arguendo, that an "application for duplicate title" were a "security" within the meaning of Title 18 U.S.C. 2311 and 2314 (and petitioner by no means admits that it is), even then, the proscription of the law would still not apply because it is no place alleged that the "application" itself was false or forged; if anything, all what is alleged is that the endorsement thereon was forged and it has been held that "In enacting this section, Congress expressed an intention to reach only forged securities, not forged endorsements." *United States v. Simpson*, 577 F.2d 78, 81 (9th Cir. 1978), see also *United States v. Sciortino*, 601 F.2d 680, 682 (2nd Cir. 1979) wherein a forged endorsement on an otherwise genuine stock certificate did not render the security a forged security within the meaning of Title 18 U.S.C. 2314.

Probably the most persuasive case of all, on this point, is *United States v. Canton*, 470 F.2d 861, 863, 864, 865, (2nd Cir. 1972), which case overruled *United States v. Rosenthal*, 342 F. Supp. 741 (D.C. N.Y. 1972) which had held that a New York Certificate of Registration of a Motor Vehicle was a "writing evidencing ownership" and was a "certificate of interest in property," and thus a "security" within the section proscribing interstate transportation of falsely made, forged securities.

The *Canton* (*supra*) decision specifically stated that the certificate of registration was neither "a certificate of interest in property" nor a document or writing "evidencing ownership of goods, wares, and merchandise" and therefore not a "security" within the meaning of Title 18 U.S.C. 2311 and 2314, the case has a discussion of the legislative history of Title 18 U.S.C. §§ 2311 and 2314 and also notes that "If there were any doubt or any conflict in interpretation of the statutes, it must be resolved in favor of the appellant," *United States v. Canton*, 470 F.2d 861, citing *Prussian v. United States*, 282 U.S. 675 (1931) and *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

The dissent of Judge Holloway notes that the situation here is similar to that in *United States v. Jackson*, 576 F.2d 755, 756 (8th Cir. 1978), *cert. den.*, 439 U.S. 828, 858, which case noted the rule of strict construction of criminal, penal statutes and he noted that the Tenth Circuit itself had applied that rule to the Statute in question citing *United States v. Sparrow*, 635 F.2d 794, 796 (10th Cir. 1980, en Banc).

Thus the decision of the Tenth Circuit Court of Appeals in this case, conflicts with the holdings of other Federal Circuits and substantially changes the rules of Judicial construction established by this Court. For these reasons

the decision below calls for an exercise of this Supreme Court's supervisory power and its authoritative ruling as to whether an "application for duplicate title" is a "security" within the meaning of Title 18 U.S.C. §§ 2311 and 2314.

2. The Convictions and Sentencing Procedure of the Trial Court and Their Affirmance by the Court Below Are Violative of Petitioner's Rights, Guaranteed Him by the "Double Jeopardy" Clause of the Fifth Amendment to the United States Constitution.

The petitioner, in this case, was convicted of two counts of violating Title 18 U.S.C. § 1014, these were counts 3 and 4 of the 12 count indictment. It is undisputed in the record and the stipulated facts on which the case was tried clearly establish that the defendant-petitioner made but ONE telephone call. During the course of that call two names were mentioned by the petitioner. This one call took place on January 18, 1979.

Clearly, if the government is entitled to but one count growing out of a single telephone call, as they would be if the defendant had been charged with wire fraud (or in the case of mail fraud one letter would constitute one count even if defendant had mentioned ten names in the letter), then the defendant-petitioner in sustaining two convictions and two *consecutive* sentences, has sustained multiple punishment for the same offense. Such a result is clearly violative of the "double jeopardy" clause of the Fifth Amendment to the United States Constitution. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether they are two offenses for double jeopardy purposes or only one is whether one statute requires proof of a fact which the other does not. *Brown v. Ohio*, 432 U.S. 161, 166 (1976).

If the decision below be upheld then it seems that the number of counts of fraud with which a defendant can be charged and the decision to so decide is delegated to the whim of a clerk at the bank who decides the point depending on the number of different pieces of paper he or she fills out. One count for each piece of paper. This is obviously an improper delegation of the prosecutorial prerogative.

Here, the defendant-petitioner made but one call, and provided information to the bank's employee concerning two individuals. Obviously, the telephone call was but one transaction. The defendant was charged with violating but one statute, Title 18 U.S.C. 1014. The proof of the violation of the statute charged in Count 3 of the indictment was the same as the proof offered in Count 4, except for the additional exhibit offered by the government (stipulation exhibit B) which was a second form filled out by a bank employee during the course of the single call. It is submitted that the conviction of defendant-petitioner on both of Counts 3 and 4 and the two consecutive sentences imposed were improper and in violation of the petitioner's rights not to be twice put in jeopardy for the same offense, a right guaranteed by the Fifth Amendment to the United States Constitution.

3. Scienter Is a Separate and Distinct Element of the Crime of Fraud and Must Be Affirmatively Proven, Beyond a Reasonable Doubt, in Order for the Government to Sustain a Conviction Therefor. Scienter Was No Place Proven Beyond a Reasonable Doubt in This Cause.

As was stated before, this entire case went to the Bench on a written, stipulated, set of facts. Even reading the stipulation in the light most favorable to the government it is impossible to find one reference to the fact

that petitioner Zwego knew that the information he was giving the bank employee was false or fraudulent at the time he was giving the information. The best which can be said from the stipulations is that some of the information turned out to be incorrect when the bank checked it out, as petitioner had a right to expect them to do. The record also shows that there is absolutely NO nexus between Counts 3 and 4 and Count nine, consequently Counts 3 and 4 must stand or fall on their own, and only the stipulated facts relating to them can be considered by the trial court or the Court of Appeals in reaching their respective verdicts, or rulings. A reading of the stipulations also reveals that petitioner would testify that he indeed had in his possession the vehicles he was seeking qualified buyers for; a fact tending to prove the innocence of the petitioner, and one which the trial court and appeals court apparently overlooked.

It is the law of this United States Supreme Court, that the prosecutor has the burden of proving *each and every element* of the offense charged, beyond a reasonable doubt. *Moore v. United States,* 429 U.S. 20, 22 (1976) (Emphasis supplied).

The test of sufficiency of evidence to sustain a criminal conviction is whether reasonable minds could find that the evidence excludes *every hypothesis* but that of guilt. *Miller v. United States,* 382 F.2d 583, 585 (9th Cir. 1967), *cert. den.,* 390 U.S. 984 (Emphasis supplied).

That scienter is independent element in a fraud case, petitioner shows to the Court that: "It is horn book law that *fraud is never presumed* but must be established by clear and persuasive evidence." *Jett v. Zink,* 362 F.2d 723, 729 (5th Cir. 1966), *cert. den., Chamberlin v. Zink,* 385 U.S. 987 and *Zink v. Pack,* 385 U.S. 987 (Emphasis supplied). The Tenth Circuit itself held that "One can-

not be held to guilty knowledge of the falsity of his statements simply because a reasonable man, under the same or similar circumstances, would have known of the falsity of such statements." *Elbel v. United States*, 364 F.2d 127, 134 (10th Cir. 1966), *cert. den.*, 385 U.S. 393. Additionally, it has been held that in order for statements to be false or fraudulent, it must be shown that the declarant *knew that they were false at the time he made them. Acme Valve & Fittings Co. v. Wayne*, 386 F. Supp. 1162, 1169 (S.D. Tex. 1974) citing *DeMert & Dougherty v. Chesebrough-Ponds, Inc.*, 348 F. Supp. 1194 (D. Ill. 1972). And finally, in a case on a violation of this same law the Circuit Court of Appeals for the 10th Circuit has held that with reference to a false statement of a defendant in influencing a federally insured bank that an element of the crime is ". . . that defendant did so knowingly . . .", *United States v. Kramer*, 500 F.2d 1185, 1187 (10th Cir. 1974).

The indictment in this case (counts 3 and 4 thereof) states that petitioner "knowingly" related false information to the bank employee (as indeed, it must state in order to state a count of fraud). It is also hornbook law that the evidence must prove and conform to the wording of the indictment. Thus, in a stipulated case, as this one, someplace in the stipulation it must state that Zwego knew the information he gave was false at the time he gave it. If the wording were not there, there would have to be sufficient other facts stated so that reasonable minds could find that the evidence excluded every hypothesis but guilt! *Miller v. U.S., supra.* A careful reading of the stipulations in this case simply do not support a finding of scienter on petitioner's part but the opinion below dismisses this point with one sentence at the end of the majority opinion stating that

"Appellant's claim that there was a lack of sufficient evidence to convict him is without merit." *United States v. Zwego, supra.* This summary disposition, notwithstanding that the government spent a considerable part of its appellate brief on this point of defendant.

4. The Decision Below Completely Misapprehends What Statements Petitioner Made to the Federally Insured Bank and Their Affirmance Relies on Such Misstatement of What the Evidence Was in the Trial Court.

At headnote three of its opinion in *United States v. Zwego, supra,* the Appeals Court states "we find that the providing of information regarding the customer's *creditworthiness* is in effect an 'application' for a loan. . ." Such a holding shows that the Court misapprehended what information the petitioner gave to the banker. A reading of the stipulated facts which the government relied on to establish defendant-petitioner's guilt shows clearly, exactly what information petitioner gave the bank. In each count the petitioner supplied the bank with a name, an address, a telephone number, a place of employment, a social security number and a description of the type of car petitioner hoped to sell the individual along with the price that petitioner was asking for the vehicle. This was *all* of the information which petitioner supplied to the bank and is, therefore, the only information from which the Trial Judge could conclude the guilt of petitioner.

Petitioner concedes that information as to creditworthiness does appear at the bottom of page 2 of each of exhibits A and B of the stipulated facts, but it is obvious from reading the stipulations themselves that the bank obtained that information on their own, completely inde-

pendently of the petitioner's telephone call. The facts are that petitioner supplied NO information on the creditworthiness of the individuals to the bank: hence, the Appeals Court's finding that this "creditworthiness" information is "actionable" under Title 18 U.S.C. § 1014, is a misstatement of the facts and evidence and is just plain erroneous.

5. The Opinion Below Is Erroneous in That It Holds That a Form Denominated "Customer Statement" Is a Loan Application As the Term "Application" Is Used in Title 18 U.S.C. § 1014.

Counts 3 and 4 of the indictment in this case charge petitioner with willfully and knowingly making material false statements to a bank for the purpose of influencing the action of the bank upon an application for a loan.

The petitioner, in his telephone conversation of January 18, 1979, provided certain information (as is more fully set out under argument 4 above) some of which was not accurate. The exhibits upon which the government relied (stipulation exhibits A and B) are not applications for a loan, but are, if their plain language can be believed, a form denominated by the bank as a "customer statement". They are not signed by anyone nor is there any place thereon for an alleged borrower to sign requesting that a loan be made to him. There is nothing whatever thereon which could be used as evidence in the legal enforcement of the payment of a debt (if a loan had been made, which it was not), hence the form is nothing more than some sort of worksheet for bank employees. Indeed, the only place on the form which seems to be reserved for a customer signature is a waiver of the provisions of Title 15 U.S.C. § 1681(d), which will be discussed *infra*.

From whence the trial court, or for that matter the Court of Appeals could conclude that:

> "In the present case we are presented with a streamlined automobile loan application procedure. The automobile dealer contacts the bank by telephone and provides certain identification and credit information concerning the prospective customer. The information is reduced to writing by the bank employee onto a customer statement form. This 'form' is then reviewed by the bank officer for approval for a loan or disapproval. No further 'application' is necessary. The subsequent procedure if the loan is approved only involves the forwarding of the loan money by the bank to the automobile dealer. The customer, in return, executes a promissory note in favor of the dealership, and the dealer assigns the note to the bank." *United States v. Zwego, supra,* pp. 250, 251.

Is beyond comprehension. Again this statement of the Appeals Court reads into the stipulations facts which are simply not there and then relies on such facts to reach its conclusion. It is common knowledge that no bank turns loose its funds without being "secured" within the meaning of the law so as to be able to enforce the obligation to repay the loan. The assumption that a federally insured bank would conduct its business in the fashion stated in the opinion, attributes to the bank a complete lack of business *acumen*. Your relator knows of NO bank in the greater Kansas City Area, including the bank here in question, which does not require a signed Uniform Commercial Code Form 1 (replaced what used to be known as a chattel Mortgage) and a "Financing Statement, Dealer Paper" (to which the promissory note is attached) in order to secure a "security interest" in the automobile which is the subject of the "sale."

It is the petitioner's contention that the evidence in the case must support the government's contention that the false statement is made in connection for a loan.

It is obvious that Congress did not make all false statements to a bank insured by the Federal Deposit Insurance Corporation a crime. Instead, the Congress limited the instances wherein a false statement to an insured bank would be a criminal act. The act of calling a bank and providing them with information on potential customers to determine whether the potential customer could or would be financed by the bank is not an act proscribed by the provisions of Title 18 U.S.C. 1014. It is highly likely that the Automobile dealer would make an exploratory inquiry prior to telling a potential customer of the dealer that he could get financing for him and then lose the sale because the customer is turned down and insulted thereby.

6. The So Called "Streamlined" Loan Procedure Described by the Court Below Is Incorrect Because If Followed It Would Be a Violation of Title 15 U.S.C. § 1681 et seq. and Would Also Constitute a Violation of the Criminal Law of the State of Kansas.

No bank or other lending institution or credit reporting agency would operate as set out in the decision below because to do so would be in violation of the provisions of Title 15 U.S.C. § 1681d, which provides that:

> "(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—
>
> (1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general repu-

> tation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, . . ." (The full text of the statute is set out in the appendix hereto).

Kansas Statutes Annotated 50-705 reads exactly the same and additionally, K.S.A. 50-718 provides that:

> "Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be deemed guilty of a class A misdemeanor and upon conviction thereof shall be punished in the manner provided by law."

and

> K.S.A. 50-720. PENALTIES. provides that "Any person violating any of the provisions of K.S.A. 50-701 to 50-719, inclusive, and amendments thereto, for which penalties are not otherwise hereinbefore provided shall be deemed guilty of a class C misdemeanor and upon conviction thereof shall be punished in the manner provided by law."

The above citations within this point are known as the Fair Credit Reporting Act. The Kansas Act and Federal Act are essentially the same. When one reads the opinion below and refers to the stipulation exhibits A and B (page two thereof) it becomes obvious that the only place where there is space provided for a customer to sign is the middle of the page after the statement:

> "NOTICE: The creditor may cause a credit investigation to be made concerning your character, general reputation, personal characteristics and mode of living

among your friends, neighbors, associates, consumer reporting agencies, and other sources to be considered . . . etc."

It is perfectly obvious that this is the warning required by the provisions of the Fair Credit Reporting Act, as set out above. Now, the banker certainly knows why this language is on the consumer statement form with line provided for the customer's signature.

If one simply read the Tenth Circuit opinion in this case he would conclude that the procedure described there and referred to in point 5 above were legal and he might well guide his actions with respect to credit information seeking thereby, in which case, he might well commit a crime under the provisions of K.S.A. 50-720 at the very least. Hence the Tenth Circuit opinion in this case cannot be left standing as it is inasmuch as it seemingly approves the violation of Federal and State Statutes. A viewing of exhibits A and B reveals that the warning is not signed by the customer even though credit information is on the bottom of page two and the bank obtained that information without the alleged applicants knowing about the investigative consumer report being obtained. This was a violation of the above referenced laws. Perhaps it could be said that Zwego aided or abetted in causing the bank to make the investigative consumer report, but that is not what he was charged with!

7. The United States District Court for the District of Kansas Had No Jurisdiction to Try the Appellant for the Offense of Making False Statements to a Bank the Deposits of Which Were Insured by the Federal Deposit Insurance Corporation Because the Proper Venue in the Case Was in the Western District of Missouri.

The petitioner, while sitting in his office in Kansas City, Missouri placed a telephone call to a bank in Kansas City, Kansas, and provided an employee there with certain information relative to two alleged potential customers of his. Some of the information was not factually correct. At no time did the petitioner supply any paper work to the bank in Kansas, nor did he mail anything to the District of Kansas, nor for that matter, did he go over to the bank in person concerning this matter. All of defendant petitioner's act with respect to the transaction was done in the State of Missouri.

Title 18 U.S.C. § 3237 PROVIDES IN PERTINENT PART THAT

> "(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be ininquired of and prosecuted in any district in which such offense was begun, continued, or completed."

Rule 18 of the FEDERAL RULES of Criminal Procedure provides:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The Court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

It has been held, however, that the crime of making false statements does not involve "distinct parts" or a "continuously moving act" so as to be within the contemplation of Title 18 U.S.C. § 3237. *United States v. Mischlich*, 310 F. Supp. 669 (D.C. N.J.), *Aff'd*, 445 F.2d 1194 (3rd Cir. 1971), *cert. den.*, 404 U.S. 984. In the instant case, the petitioner, merely provided information over the phone to a clerk at the bank, who copied the information onto a "customer information" form. While the bank in Kansas did receive the information as he supplied it over the phone, it is submitted that this fact, alone, does not confer jurisdiction in the District of Kansas to try the petitioner. *United States v. Ruehrup*, 333 F.2d 641 (1) (7th Cir. 1964), *cert. den.*, 379 U.S. 903. It goes without saying that such liberal rules of election as to Districts, and in this case, Circuits, permits the prosecutorial authority to go "forum shopping," a practice not favored in the law.

CONCLUSION

It is submitted that the questions raised by the opinion are, at least in part, of first impression to this Court. The Tenth Circuit is in conflict with the published opinions of other Circuit Courts of Appeal, and, some of the conclusions reached and published have no basis in the Stipulations of Fact on which the case was tried. To the extent that this published opinion below could be relied on by persons in the credit reporting or lending business, it is exceedingly likely that it will result in mistake (at best) and liable persons to possible criminal prosecution (at worst). For these reasons it is submitted that the matters presented are serious and require the supervisory authority of this United States Supreme Court to bring order within the Circuits and correct the errors

in the opinion. For these reasons it is urged and prayed by petitioner that this Court issue its Writ of certiorari to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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October 27, 1981

APPENDIX A-1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Raymond W. ZWEGO, Jr.,
Defendant-Appellant.

No. 80-1008.

United States Court of Appeals,
Tenth Circuit.

Submitted Dec. 1, 1980.

Decided June 9, 1981.

Rehearing Denied Sept. 22, 1981.

Defendant was convicted in the United States District Court for the District of Kansas, Earl E. O'Connor, J., of knowingly making material false statements in connection with two applications for loans to a federally insured bank and interstate transportation of a falsely made and forged security, and he appealed. The Court of Appeals, Seth, Chief Judge, held that: (1) forged and falsely notarized application for a duplicate motor vehicle title was a "security" within meaning of statute prohibiting interstate transportation of stolen or forged securities; (2) false information given federally insured bank by defendant regarding customer's credit-worthiness was in effect an "application" for a loan within meaning of statute making it a crime to knowingly make material false statements in an application for a loan from a federally insured bank, even though such information was not transcribed onto an application form, but merely a "customer statement" form, where the customer statement form was the only form required for obtaining the loan;

(3) consecutive sentences for violations of statute making it a crime to knowingly make material false statements in an application for a loan from a federally insured bank did not constitute double punishment for the same crime, where the violations involved two different loan applications; and (4) venue was properly laid in the city in which the false information was received by the bank.

Affirmed.

Holloway, Circuit Judge, filed concurring and dissenting opinion.

1. Receiving Stolen Goods (Key) 2

Forged and falsely notarized application for a duplicate motor vehicle title was a "security" within meaning of statute prohibiting interstate transportation of stolen or forged securities. 18 U.S.C.A. §§ 2311, 2314.

See publication Words and Phrases for other judicial constructions and definitions.

2. Banks and Banking (Key) 509

Under statute making it a crime to knowingly make material false statements in an application for a loan from a federally insured bank, it is not necessary that the application for the loan be formal. 18 U.S.C.A. § 1014.

3. Banks and Banking (Key) 509

False information given federally insured bank by automobile dealer regarding customer's credit-worthiness was in effect an "application" for a loan within the meaning of statute making it a crime to knowingly make material false statements in an application for a loan from a federally insured bank, even though such information

was not transcribed onto an application form, but merely a "customer statement" form, where the customer statement form was the only form required for obtaining the loan. 18 U.S.C.A. § 1014.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law (Key) 196

Test for determining the identity of offenses for double jeopardy purposes is whether "each count requires proof of a fact or element not required by the other." U.S.C.A. Const. Amend. 5.

5. Criminal Law (Key) 202(1)

Consecutive sentences for violations of statute making it a crime to knowingly make material false statements in an application for a loan from a federally insured bank did not constitute double punishment for the same crime, where the violations involved two different loan applications. 18 U.S.C.A. § 1014; U.S.C.A.Const. Amend. 5.

6. Criminal Law (Key) 113

Proper venue for the offense of making false statements in an application for a loan from a federally insured bank may be either where the false statements were prepared, executed, or made, or where the offense was completed upon receipt of the false information by the bank. 18 U.S.C.A. § 1014.

7. Criminal Law (Key) 113

In prosecution for making false statements in applications for loans from a federally insured bank, venue was

properly laid in the city in which the false information was received by the bank. 18 U.S.C.A. §§ 1014, 3237(a).

Paul Anthony White, Gladstone, Mo., for defendant-appellant.

James P. Buchele, U. S. Atty., Douglas B. Comer, Asst. U. S. Atty., Kansas City, Kan., for plaintiff-appellee.

Before SETH, Chief Judge, and HOLLOWAY and McWILLIAMS, Circuit Judges.

SETH, Chief Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R. App.P. 34(a); Tenth Cir. R. 10(e). This cause is therefore ordered submitted without oral argument.

Defendant-appellant Zwego was charged and convicted of knowingly making material false statements in connection with two applications for loans to a federally insured bank in violation of 18 U.S.C. § 1014, and interstate transportation of a falsely made and forged security in violation of 18 U.S.C. §§ 2311 and 2314.

Appellant telephoned the Westgate State Bank located in Kansas City, Kansas and placed two applications for automobile loans on behalf of two "customers," Mr. Robert Helling and Mr. George Fine. The information that appellant supplied contained false statements regarding the addresses, places of employment, social security numbers, and telephone numbers of these individuals. In addition, Mr. Fine and Mr. Helling did not authorize such applications nor were they ever customers of appellant's business, as represented by appellant to the Bank. The Bank employee

transcribed this false information onto "customer statement" forms and submitted both documents for approval to the Bank's vice president. The information was found to be false and the loans were not made.

Appellant was also convicted of interstate transportation of a falsely made and forged security. Appellant had received on consignment a 1977 Dodge van, the title and ownership of which was registered in the name of Jacpad Corp. Financial Service, Inc. with the Kansas Motor Vehicle Division. Appellant executed a forged and falsely notarized application for a duplicate motor vehicle title for this van and sent it from Kansas City, Missouri to the Kansas Department of Revenue Office in Topeka, Kansas without the knowledge or authorization of Jacpad, the registered owner. On the basis of this notarized application the Kansas Department of Revenue issued a duplicate title for the vehicle. Appellant contends that the trial court erred in its determination that the forged and falsely notarized application for a duplicate motor vehicle title was a "security" within the meaning of 18 U.S.C. §§ 2311 and 2314. The term "security" has been given an expansive definition in 18 U.S.C. § 2311 to include any "instrument or document or writing evidencing ownership of goods, wares, and merchandise."

The pervasive and broad-ranging definition of securities set forth in section 2311 demonstrates the Congressional intent that the term security should be construed broadly and beyond the usual commercial meaning of the term. *United States v. Jackson*, 576 F.2d 749 (8th Cir.); *United States v. Speidel*, 562 F.2d 1129 (8th Cir.); *United States v. Austin*, 462 F.2d 724 (10th Cir.).

A state certificate of title for a motor vehicle has been held to be a security under section 2311. *See United*

States v. Elliott, 571 F.2d 880 (5th Cir.); *United States v. Dickson*, 462 F.2d 184 (4th Cir.). In *United States v. Sparrow*, 635 F.2d 794, this court implicitly held that a certificate of title is a security within the meaning of section 2311. We there concluded that the certificate as sent from Washington state was not forged or false in its execution.

In *United States v. Dickson*, 462 F.2d 184 (4th Cir.), the court held that a statement of source of title of a motor vehicle was a security within the definition of section 2311. A security can be an evidence of a right of ownership. "It is the right or interest apparently represented that has value rather than the document itself." *United States v. Speidel*, 562 F.2d 1129 (8th Cir.). In the present case the appellant forged an application for a duplicate certificate of title of a motor vehicle. The application does require a notarized statement that the signor owns the vehicle in question and requests a duplicate of true title. Therefore, the application presupposes that the signor is the owner of the vehicle. The clear implication of such document is that a valid title document exists but has been lost or stolen. Once the duplicate certificate of title is issued it has value as evidence of ownership of the vehicle. *Farmers Ins. Co., Inc. v. Schiller*, 226 Kan. 155, 597 P.2d 238.

[1] Thus this forged application while not an actual certificate of title was clearly usable as an intermediate step in obtaining the actual certificate of title. Consequently, we find that the executed application for a duplicate title of a motor vehicle has value to a forger since it enables the possessor to obtain a valid title which evidences ownership . Given the nature and use of the application for duplicate title in motor vehicle transactions we think that an application is a writing evidencing ownership in goods for purposes of section 2311. Thus we agree

with the district court that it is indeed a security within the meaning of section 2311.

Appellant also contends that his oral statements to the Bank employee did not constitute an "application" and thus is not an act proscribed by 18 U.S.C. § 1014.

Section 1014 makes it a crime to knowingly make false statements as to a material fact in an applicaton for a loan for the purpose of influencing the bank to make the loan. The gist of the offense is the attempt to influence the bank to extend financing through the delivery or communication of false statements. *United States v. Kernodle*, 506 F.2d 1398 (4th Cir.). *See also United States v. Madsen*, 620 F.2d 233 (10th Cir.).

[2] Appellant asserts that the information appellant provided the Bank was not transcribed onto an application form, but merely a "customer statement" form. However, for purposes of section 1014 it is not necessary that the application for the loan be formal. In *United States v. Hubbell*, No. 76-1119 (10th Cir.), we affirmed a section 1014 conviction based on an oral misrepresentation despite the absence of a formal loan application. We found "that the statute does not call for a formal application. Its terms apply to anyone who 'knowingly makes any false statement or report, . . . upon any application.' No formalities are demanded." *Id.*

It is clear that both oral and written statements are covered by the statute. In addition, it is not necessary that the false statement be an "application" in and of itself. *See United States v. Sackett*, 598 F.2d 739 (2d Cir.); *United States v. Hubbell*, No. 76-1119 (10th Cir.).

In the present case we are presented with a streamlined automobile loan application procedure. The automobile dealer contacts the bank by telephone and provides

certain identification and credit information concerning the prospective customer. The information is reduced to writing by the bank employee onto a customer statement form. This "form" is then reviewed by the bank officer for approval for a loan or disapproval. No further "application" is necessary. The subsequent procedure if the loan is approved only involves the forwarding of the loan money by the bank to the automobile dealer. The customer, in return, executes a promissory note in favor of the dealership, and the dealer assigns the note to the bank.

[3] In view of those facts we find that the providing of information regarding the customer's creditworthiness is in effect an "application" for a loan since the customer statement form is the only form required for obtaining the loan. Thus, appellant's false statements recorded on the customer statement form were clearly actionable under 18 U.S.C. § 1014.

Appellant also asserts that consecutive sentences for the violations of 18 U.S.C. § 1014 constitute double punishment for the same crime. He contends that his statements regarding the two loan applications constitute the same offense under section 1014.

[4] The double jeopardy clause protects against multiple punishment for the same crime. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. The established test for determining the identity of offenses is whether "each count requires proof of a fact or element not required by the other." *Nolan v. United States*, 423 F.2d 1031 (10th Cir.); *Doherty v. United States*, 193 F.2d 487 (10th Cir.).

[5] It has been held that making a number of false statements to a lending institution for a single loan constitutes one criminal violation under 18 U.S.C. § 1014.

United States v. Sue, 586 F.2d 70 (8th Cir.); *United States v. Sahley*, 526 F.2d 913 (5th Cir.). However, in the present case we have a number of false statements involving two different loan applications. The proof presented concerning the falsity of the statements for each application was necessarily different since there were two applicants. Accordingly, it was permissible for the trial court to impose consecutive sentences for the conviction under section 1014.

Appellant next asserts that venue was improperly laid in Kansas City, Kansas. Venue questions raise "deep issues of public policy in the light of which legislation must be construed." *United States v. Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236. The provision for trial in the vicinity of the crime protects the accused against hardship and unfairness incident to a trial conducted in a remote place. *United States v. Jackson*, 482 F.2d 1167 (10th Cir.).

18 U.S.C. § 3237(a) provides that any offense against the United States begun in one district and completed in another or committed in more than one district may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

[6, 7] The proper venue for the offense of making false statements to a federally insured bank may be either where the false statements were prepared, executed, or made, or where the offense was completed upon receipt of the false information by the bank. *United States v. Candella*, 487 F.2d 1223 (2d Cir.); *United States v. Ruehrup*, 333 F.2d 641 (7th Cir.).

Appellant's telephone call from Kansas City, Missouri to the Bank in Kansas City, Kansas, a contiguous city, transmitted false information regarding two bank applications for an automobile loan. Consequently, the crime of making false statements for a loan application was com-

pleted when the Bank employee transcribed the information telephonically received onto the application form. We, therefore, find that venue was properly laid in Kansas City, Kansas. Appellant's claim that there was a lack of sufficient evidence to convict him is without merit.

AFFIRMED.

HOLLOWAY, Circuit Judge, concurring and dissenting:

I am in agreement with the majority opinion except as to its affirmance of the conviction on count 9 under 18 U.S.C. § 2314. I am unable to agree that the application for a duplicate title comes within the definition of "securities" under the criminal statutes and would reverse that conviction.

It is true that an actual certificate of title has been held to be a security within the definitions of 18 U.S.C. § 2311. Nevertheless I find no support in the cases for holding a mere application by a private party for a duplicate certificate to be a security. Indeed, *United States v. Canton*, 470 F.2d 861 (2d Cir.), rejected the Government's contention that a New York motor vehicle registration is a security by coming within the terms of "a certificate of interest in property" or a document or writing "evidencing ownership of goods, wares, and merchandise," as the definitions are extended by § 2311. The *Canton* opinion persuasively reviews the legislative history and concludes that such an instrument has no value in itself, pointing to the commercial sense within which the terms are used. *Id.* at 863-64.

Thus the holdings on automobile certificates of title or duplicate certificates of title themselves, *e. g.*, *United States v. Elliott*, 571 F.2d 880, 908 (5th Cir.) (stressing

that the certificate is prima facie evidence of ownership under Georgia law), do not support the Government here in the case of a mere application for a certificate.

The Kansas statutes do not recognize any independent function or commercial use for an application for a duplicate certificate. See K.S.A. 1975 §§ 8-135 and 8-139. The request merely contemplates issuance of the duplicate certificate. It is more like the blank share certificates which were held not to come within the statute in *United States v. Jackson*, 576 F.2d 749, 755-56 (8th Cir.), *cert. denied*, 439 U.S. 828, 858, 99 S.Ct. 102, 175, 58 L.Ed.2d 122, 167, the court there noting the rule of strict construction. The rule of strict construction of criminal statutes, *see Prussian v. United States*, 282 U.S. 675, 677, 51 S.Ct. 223, 224, 75 L.Ed. 610, has been applied by us to this offense. *United States v. Sparrow*, 635 F.2d 794, 796 (10th Cir.) (en banc); *see also United States v. Canton, supra*, 470 F.2d at 865.

For these reasons I must respectfully dissent as to the affirmance of the conviction of count 9.

APPENDIX A-2

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
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RE: 80-1008, U.S.A. v. Zwego

Dear Counsel:

Enclosed is a copy of an order entered today in the captioned cause.

Very truly yours,

Howard K. Phillips, Clerk
By /s/ Rosalyn Peterson, Deputy Clerk

JULY TERM - September 22, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

No. 80-1008

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND W. ZWEGO, JR.,
Defendant-Appellant.

This matter comes on for consideration of the motion of appellant for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the motion for rehearing is denied by the members of the panel that rendered the decision sought to be reheard.

The Clerk transmitted the suggestion for rehearing to judges of the Court who are in regular active service. No judge in regular active service or a judge who was a member of the panel that rendered the decision sought to be reheard having requested a vote on the suggestion made by the appellant, Rule 35 (b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Criminal No. 79-20062-01

UNITED STATES OF AMERICA,
Plaintiff,

v.

RAYMOND W. ZWEGO, JR.
Defendant.

STIPULATION

Comes now the United States of America, by and through Douglas B. Comer, Assistant United States Attorney for the District of Kansas, and the defendant, Raymond W. Zwego, appearing in person and by counsel, Paul Anthony White, and would enter into the following stipulation as to facts which would be, and are hereby submitted into evidence for purposes of defendant's trial to the court upon the charges contained in Counts III, IV and IX of the Indictment now pending in this case.

The facts in evidence stipulated by the parties are as follows:

I. Government's Evidence

A. *Count III*

(1) It is stipulated that the Westgate State Bank, located in Kansas City, Kansas, is now, and was at all times specified in the indictment, a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation.

(2) It is stipulated that Raymond W. Zwego, Jr., defendant herein, at all times during the indictment, owned and operated an automobile dealership in Kansas City, Missouri, known as New Mark Motors.

(3) That Mr. Dale Carter, Vice President, Westgate State Bank, would testify as follows: That automobile loans extended by the Westgate State Bank are routinely granted for approved customers referred to said bank by certain preferred automobile dealers in the Kansas City area; and that the manner and method in which such loans are obtained by automobile dealers for their customers is as follows: an automobile dealer will telephonically contact a bank employee at the bank's location in Kansas City, Kansas, and provide certain identification and credit information concerning the prospective customer. This information is reduced to writing by bank personnel and placed upon a "customer statement form" and this form is then reviewed by a bank officer for approval or disapproval. By supplying this information, it is understood that the dealer thereby requests approval of the loan by the bank, with the understanding that if the cutsomer is approved, the bank will then loan the customer the money to buy the car and forward the money so loaned directly to the dealer upon receiving the promissory note executed in favor of the dealership by the customer, properly assigned by the dealer to the bank. Thus, the telephonic contact wherein the dealer supplies information concerning the customer and requests approval of the customer for financing, constitutes an application for a loan for that particular customer.

(4) It is stipulated and agreed that the government's evidence would show, by the testimony of Karen Saunders and Dale Carter, Westgate State Bank employees, that on or about January 18, 1979, Raymond W. Zwego, defendant herein, telephonically contacted Karen Saunders, secretary at Westgate State Bank, Kansas City, Kansas, and did state to her that he wanted to make application to Westgate State Bank for automobile loan financing for a customer of New Mark Motors by the name of Robert A. Helling, whom he (Zwego) stated was, in fact, purchasing a car at New Mark Motors. Mr. Zwego supplied the following information concerning Mr. Helling and the automobile that he was purportedly purchasing: that Mr. Helling resided at 7144 Horton, Overland Park, Kansas; that he was employed by the Penn-Central Company of Kansas City, Kansas; that his telephone number was 648-3741; that his social security number was 515-18-9046; that he was purchasing a 1977 Buick Electra, cash selling price of $6,550; and that Mr. Helling was requesting financing in the amount of $4,900. This information was transcribed to a "customer statement form" and submitted to Mr. Dale Carter, Vice President, Westgate State Bank, for approval. Mr. Carter would testify that this form, as completed, constituted, in fact, an application for a loan to be extended in favor of Mr. Helling by the Westgate State Bank. (Exhibit A attached hereto and incorporated herein)

(5) That Mr. Carter would testify that the information set forth above concerning Mr. Helling was submitted by Mr. Zwego to the Westgate State Bank for the express purpose of influencing

the Westgate State Bank to extend a loan in the amount of $4,900 the funds of which, if made, would have been forwarded to New Mark Motors.

(6) That Mr. Robert A. Helling, president of the Penn-Central Company, located in Kansas City, Kansas, would testify that he did not, on or about January 18, 1979, or at any other time, live at 7144 Horton in Overland Park, Kansas; that his telephone number has never been 648-3741; that his social security number is not 515-18-9046; and that he was not, on or about January 18, 1979, nor has he ever been, a customer of New Mark Motors; that he has never requested financing from the Westgate State Bank in Kansas City, Kansas, for the purchase of any automobiles through New Mark Motors or any other automobile dealership; and that he does not know of, and has never done business with, Raymond W. Zwego or New Mark Motors.

(7) Mr. Carter would testify that the information communicated to the Westgate State Bank by Mr. Zwego indicating that Mr. Helling was a customer of New York Motors requesting financing from Westgate was information which was material to the bank's consideration of the loan request. That the very fact that Mr. Zwego represented Mr. Helling to be a customer of New Mark Motors caused them to accept the application and examine it with a view towards extending financing to Mr. Helling; that this was due to the trust relationship existing between the Westgate State Bank and Mr. Zwego by virtue of previous automobile loans which had been extended by the bank to customers of New Mark Motors under identical circumstances.

B. *Count IV*

(1) Facts stipulated in paragraphs one, two and three of section A above pertaining to Count III of the Indictment are hereby stipulated as to Count IV of the Indictment.

(2) It is stipulated and agreed that the Government's evidence would show, by the testimony of Karen Saunders and Dale Carter of the Westgate State Bank, that on or about January 18, 1979, Mr. Raymond W. Zwego, defendant herein, did telephonically contact Ms. Saunders at the Westgate State Bank and did state to her that he wanted to make application to the Westgate State Bank for automobile loan financing for a customer of New Mark Motors by the name of George M. Fine, Jr., whom he (Zwego) stated was, in fact, purchasing a car from New Mark Motors. Mr. Zwego supplied the following information concerning Mr. Fine and the automobile that he was purportedly purchasing: that Mr. Fine resided at 5954 Woodson in Mission, Kansas; that he was employed by one John McIntyre, d/b/a Blue Ribbon Sports of Overland Park, Kansas; that his telephone number was 384-7321; that his Social Security Number was 506-66-1617; that he was purchasing a 1977 Dodge Van, with a cash selling price of $9,450; and that he was requesting financing in the amount of $7,450. Ms. Saunders would testify that the above information, after having been received from Mr. Zwego, was transcribed onto a "customer statement form" (Exhibit B attached hereto and incorporated herein) which was then presented to Mr. Carter for approval.

(3) That Mr. Carter would testify that the information set forth above concerning Mr. Fine was submitted by Mr. Zwego to the Westgate State Bank to extend a loan in the amount of $7,450, the funds of which, if made, would have been forwarded to New Mark Motors.

(4) Mr. George M. Fine, Jr., would testify that, in fact, he has never resided at 5954 Woodson in Mission, Kansas; that he is not now nor has he ever been employed by "Blue Ribbon Sports"; that his telephone number has never been 384-7321; that he was not, on or about January 18, 1979, nor has he ever been, a customer of New Mark Motors; that he has never requested financing from the Westgate State Bank in Kansas City, Kansas, for the purchase of any automobile through New Mark Motors or any other automobile dealership; and that he does not know of, and has never done business with, Raymond W. Zwego or New Mark Motors.

(5) That Mr. Carter would testify that the information communicated to the Westgate State Bank by Mr. Zwego indicating that Mr. Fine was a customer of New Mark Motors requesting financing from the Westgate Bank was information which was material to the bank's consideration of the loan request; that the very fact that Mr. Zwego represented Mr. Fine to be a customer of New Mark Motors caused them to accept the application and examine it with a view towards extending financing to Mr. Fine; that this was due to the trust relationship existing between the Westgate State Bank and Mr. Zwego by virtue of previous automobile loans which had been extended by the bank to customers of New Mark Motors under identical circumstances.

C. *Count IX*

(1) Mr. Ronald E. Sexton, Operating Manager of *SLC of North America, Inc.*, will testify that SLC was, on February 7, 1979, the owner of five Dodge Vans financed with the Security National Bank of Kansas City, Kansas, through its subsidiary, *Jacpad Corp. Financial Service, Inc.*; that these vans had, up until February of 1979, been leased to *B. W. Jones and Sons Co.* of Kansas City. Mr. Sexton will testify that, during the fall of 1978, SLC made the decision to sell the vans and informed the Security National Bank of their desire to do so and that SLC requested Security National to find buyers for the vans, if possible.

(2) Mr. Sexton, would further testify that SLC Leasing approached Mr. Raymond W. Zwego, defendant herein, in November of 1978, and inquired if he would be willing to take the vans on consignment, to sell off of the New Mark Motors lot in Kansas City, Missouri. Mr. Quinn of Security Nat'l Bank would testify that the possession of the five vans was transferred to Mr. Zwego, although ownership remained in *SLC, Inc.*, through *Jacpad, Inc.*, subject to a lien interest in favor of the Security National Bank; and that one of the vans so transferred was registered with VIN B32BE7X157136.

(3) Mr. Harold B. Turntine, Chief of the Titles and Registrations Section, Kansas Department of Revenue, Division of Vehicles, would testify that, on or about November 20, 1978, his office in Topeka, Kansas, received a request for verification of title to one 1977 Dodge Van, VIN

B32BE7X157136. Mr. Turntine would testify that his office verified ownership of the automobile in question as being in *Jacpad Corp. Financial Service, Inc.*, with lienholder being Security National Bank of Kansas City, Kansas.

(4) Mr. Nicholas J. Repasky, Special Agent, FBI, would testify that, upon the execution of a search warrant at the premises of New Mark Motors in Kansas City, Missouri, on February 26, 1979, a "Verification of Title" form issued by the Kansas Department of Revenue, Division of Vehicles, for a 1977 Dodge Van, VIN B32BE7X157136 was recovered from the records maintained at said business establishment, owned and operated by Raymond W. Zwego, Jr., which form indicated the identical ownership information listed in paragraph three above for said vehicle.

(5) Ms. Linda Tweehus, former bookkeeper for New Mark Motors, who was employed in that position in February of 1979, would testify that, on or about February 7, 1979, Mr. Raymond W. Zwego, defendant herein, did request her to prepare an Application for Duplicate Title for a 1977 Dodge Van, VIN B32VE7X157136, showing Jacpad Corp. Financial Service, Inc., as the requester, with the name of the official signing on behalf of Jacpad to be left in blank. (Ex. C) Ms. Tweehus would testify that she advised Mr. Zwego that the Application would have to be signed by a representative of Jacpad and notarized before it could be forwarded to the State of Kansas offices. Ms. Tweehus would testify that the preparation of this form was done at the New Mark Motors offices in Kansas City, Missouri. Ms. Tweehus

would further testify that Mr. Zwego took the form to his desk some fifteen feet away from hers, remained by himself, and brought the form back approximately ten minutes later "signed" by one B. W. Jones on behalf of *Jacpad* and notorized by one *Loren Soll*. Ms. Tweehus would testify that she has never met a Loren Soll, nor has she any knowledge of any such individual being employed for New Mark Motors as reflected by the payroll records of the business; and that the only familiarity she has with that name is from its having been used as the notary on numerous documents prepared by Mr. Zwego at New Mark Motors. Ms. Tweehus would further testify that Mr. Zwego instructed one of his employees to transport the completed Application for Duplicate Title referred to above from the New Mark offices in Kansas City, Missouri, to the State of Kansas Division of Vehicles offices in Topeka, Kansas and obtain a duplicate title therewith.

(6) Mr. Turntine would testify that an Application for Duplicate Title for a 1977 Dodge Van, VIN B32BE7X157136 was received at the State of Kansas, Department of Revenue, Division of Motor Vehicles office in Topeka, Kansas, on or about February 7, 1979, purporting to be a request from the registered owner of said vehicle, *Jacpad Corp. Financial Service, Inc.*, for a Duplicate Title for said vehicle. Said application was purportedly signed and sworn to by one B. W. Jones on behalf of *Jacpad* and was notarized by one *Loren Soll*, a purported notary public for the County of Wyandotte, State of Kansas.

(7) Mr. Nicholas Pepasky will testify that, upon execution of the search warrant specified

above, that special agents of the FBI recovered a notary stamp for one Loren Soll, Notary Public for Wyandotte County, State of Kansas. This notary stamp was recovered from Mr. Raymond W. Zwego's desk at New Mark Motors, in addition to a notary seal for one Mary K. Mann, notary public for Johnson County, Kansas. Mr. Repasky would further testify that an examination of the records of the Secretary of State's Office for the states of Missouri and Kansas, indicated that there is not now, nor has there ever been, notary publics in either state by the names of Loron Soll or Mary Kay Mann.

(8) Mr. Harold B. Turntine would also testify that, based upon the Application for Duplicate Title specified above so submitted for the 1977 Dodge Van, VIN B32BE7X157136, a copy of which is attached hereto as Exhibit C and is incorporated herein, that the State of Kansas, Department of Revenue, Division of Vehicles, issued a Duplicate Title for said vehicle, showing ownership in *Jacpad Financial Service, Inc.* and lien interest in Security National Bank of Kansas City, Kansas.

(9) Ms. Teresa Tellman, Assistant Manager, Motor Vehicle Bureau, Missouri Department of Revenue, Jefferson City, Missouri, will testify that, based upon Kansas Duplicate Title No. C118673 being submitted to her agency together with a request for Original Title by Raymond W. Zwego of New Mark Motors for a 1977 Dodge Van, VIN B32BE7X157136, there was issued to said New Mark Motors a Missouri Original Title, No. L557156, on February 14, 1979, for said vehicle. Ms. Tellman would testify that the Kansas Dupli-

cate Title so submitted with said request for original title for the above-described vehicle indicated thereon that title had been transferred from *Jacpad Corp. Financial Service, Inc.*, to New Mark Motors of Kansas City, Missouri, by one *Paul Onders*. Said transfer of title was notarized upon said Duplicate Title by one Mary Kay Mann.

(10) Mr. Ronald E. Sexton of *SLC of North America, Inc.*, will testify that neither SLC nor Jacpad has ever had anyone in their employ by the name of B. W. Jones or Paul Onders; that, ownership of the Dodge Van identified above bearing VIN B32BE7X157136 has not been transferred to New Mark Motors by SLC or Jacpad.

II. *Defendant's Evidence*—The defendant's evidence would be as follows:

1. On January 18, 1979, the defendant, Raymond W. Zwego, Jr., was at his office at 8900 East New 40 Highway, Kansas City, Missouri, and placed a telephone call to the Westgate State Bank's installment loan department.

2. At that time, January 18, 1979, the defendant gave certain information to the installment loan department of the Westgate State Bank concerning one Robert A. Helling and George M. Fine.

3. The information given by the defendant to the bank is substantially as contained in the attached Exhibits A & B.

4. The defendant stipulates that the information on the attached exhibits, further identified in plaintiff's ¶4 section I(a) above and paragraphs 2, § I(b) above was not accurate at the time he gave the information to the bank.

5. The defendant had not obtained a signed credit application from either Helling or Fine prior to telephoning the information represented by Exhibits A and B to the bank.

6. Neither Robert A. Helling nor George M. Fine, Jr., had consented to have the defendant provide the information to the bank in their behalf.

7. The defendant did not ever provide the bank with a signed credit application or any other written document upon which bank funds would have been authorized to be expended.

8. It is further stipulated that if the defendant were called as a witness, he would testify that he did submit the information contained in the attached exhibits to the bank, but that he did so with the intention of determining whether Helling or Fine would qualify for loans, so that he would know whether it would be worth his time to approach either of the individuals about purchasing the car that he had told the bank about. Zwego would further testify that, at the time, January 18, 1979, he did have consigned to him a 1977 Dodge Van and a 1977 Buick Electra.

III. Statement of Stipulation and Waiver of Constitutional Right to Trial by Jury:

1. The defendant, Raymond W. Zwego, defendant's counsel, Paul Anthony White, and the United States hereby stipulate that the above statement of evidence, including exhibits attached hereto, shall be and are hereby admitted into and shall be considered as, evidence for consideration by this Court pursuant to the trial of this action against defendant Zwego before this Court. All objections to the admissibility of these facts into evidence by the represented testimony of witnesses herein summarized, and

to the admissibility of these exhibits, are hereby waived by the defendant and his counsel, with the exception of evidence set forth in paragraphs 8 and 9 pertaining to Counts III, IV and IX, Government's Evidence, to which defendant reserves objections as to admissibility.

2. The defendant, Raymond W. Zwego, hereby expressly waives his constitutional rights to trial by a jury of his peers as provided in the 6th Amendment of the United States Constitution, and consents to trial of this case by and to the United States District Court for the District of Kansas. The defendant further stipulates that the findings entered by this Court upon the evidence contained in this stipulation of evidentiary facts as to his guilt or innocence shall be accepted as the final adjudication of his guilt or innocence the same as if there had been a trial to, and verdict rendered by, a jury; however, the defendant expressly reserves his rights under the statutes of the United States to appeal any judgment so entered by this Court.

/s/ Raymond W. Zwego, Jr.
Raymond W. Zwego, Defendant

/s/ Paul Anthony White
Paul Anthony White, Counsel for Defendant
James P. Buchele
United States Attorney

/s/ Douglas B. Comer
Douglas B. Comer
Assistant United States Attorney

Exhibit A

CUSTOMER STATEMENT

INSTALLMENT LOAN DEPARTMENT — WESTGATE STATE BANK — DATE 1-18-79

AMOUNT APPLYING FOR $ 4900 — INTEREST Karen Hale $ ____

PURPOSE ____ — INSURANCE ____

YEAR 77 MAKE Buick MODEL Skylark — RESERVE DEPOSIT ____

EQUIPMENT 2 Dr Coupe 3cm

CASH SELLING PRICE $ 4350 — CHECK TO:

CASH DOWN PAYMENT $ 1650

TRADE ALLOWANCE $ ____

LESS PAYOFF $ ____

NET EQUITY $ ____

LESS TOTAL DOWN PAYMENT $ ____

AMOUNT TO FINANCE $ 4900/24 — TOTAL NOTE $ ____

FIRST NAME (PLEASE PRINT) OR TYPE — INITIAL — LAST NAME: Robert A Hellwig	C INDIVIDUAL E JOINT	M MARRIED U UNMARRIED S SEPARATED	AGE 7-7-2
RESIDENCE ADDRESS: 1194 Horton Cir Kl-204	AT PRESENT ADDRESS YEARS 7 MONTHS	PHONE NO 648-7741
PREVIOUS ADDRESS: 7716 West 54 Cir	AT PREVIOUS ADDRESS YEARS 10 MONTHS	NO OF DEPENDENT CHILDREN 0
RENTING FURNISHED / RENTING UNFURNISHED / BUYING — LANDLORD OR MORTGAGE HOLDER'S ADDRESS: Ch. Valuation Dept	(RENT OR PMT. VALUE) 235	BALANCE
EMPLOYED BY: Kan Agricultural Co.	POSITION: Mgr	MONTHLY INCOME NET 1166
COMPLETE BUSINESS ADDRESS: 7727 Roe Blvd		OFFICE TELEPHONE 236-5000
PREVIOUS EMPLOYER	HOW LONG	POSITION	MONTHLY INCOME
SOCIAL SECURITY NO: 516-22-4[illegible]	NAME OF BANK: Vidal	CHECKING ☐ SAVINGS

IF ANOTHER INDIVIDUAL WILL BE CONTRACTUALLY LIABLE FOR ANY CREDIT GRANTED AS A RESULT OF THIS APPLICATION, OR WILL USE ANY CREDIT GRANTED AS A RESULT OF THIS APPLICATION, OR YOU ARE RELYING ON JOINT OWNED PROPERTY OR ANOTHER'S INCOME TO QUALIFY FOR THIS EXTENSION OF CREDIT, PLEASE FILL OUT THE FOLLOWING PORTION OF THIS APPLICATION.

Lisa

CO BORROWER'S FIRST, MIDDLE & LAST NAME

CO BORROWER'S EMPLOYER	POSITION	HOW LONG	SALARY

IF YOU ARE OBLIGATED TO PAY ALIMONY, CHILD SUPPORT OR MAINTENANCE, PLEASE FILL OUT THIS SECTION

AMOUNT OF ALIMONY	AMOUNT OF CHILD SUPPORT	AMOUNT OF MAINTENANCE

NAME OF PAYEE	ADDRESS OF PAYEE

ALIMONY, CHILD SUPPORT, OR SEPARATE MAINTENANCE INCOME NEED NOT BE REVEALED IF YOU DO NOT WISH TO HAVE IT CONSIDERED AS A BASIS FOR PAYING THIS OBLIGATION. ALIMONY, CHILD SUPPORT, SEPARATE MAINTENANCE RECEIVED UNDER COURT ORDER ☐ WRITTEN AGREEMENT ☐ OR ORAL UNDERSTANDING ☐

AMOUNT OF ALIMONY	AMOUNT OF CHILD SUPPORT	AMOUNT OF MAINTENANCE

NAME OF PAYOR	ADDRESS OF PAYOR

HER INCOME FROM — MONTHLY INCOME $

NAME	RELATIONSHIP	RELATIVE	NAME	RELATIONSHIP
STREET ADDRESS			STREET ADDRESS	
CITY AND STATE			CITY AND STATE	

NO. AUTO MAKE MODEL YR ALT'S MAKE MODEL

NAME & ADDRESS OF AUTOMOBILE INSURANCE COMPANY & AGENT

CURRENT DEBTS & CREDIT REFERENCES - OPEN AND PAID	PRESENT BALANCE $	HIGHEST BALANCE $

HAVE YOU BEEN BANKRUPT IN LAST 14 YEARS, OR HAD ANY JUDGMENTS OR GARNISHMENTS AGAINST YOU IN LAST 7 YEARS ☐ YES ☐ NO

NOTICE: THE CREDITOR MAY CAUSE A CREDIT INVESTIGATION TO BE MADE CONCERNING YOUR CHARACTER, GENERAL REPUTATION, PERSONAL CHARACTERISTICS AND MODE OF LIVING AMONG YOUR FRIENDS, NEIGHBORS, ASSOCIATES, CONSUMER REPORTING AGENCIES, AND OTHER SOURCES TO BE CONSIDERED A PART OF THIS APPLICATION. YOU HAVE THE RIGHT TO MAKE A WRITTEN REQUEST FOR A COMPLETE AND ACCURATE DISCLOSURE OF INFORMATION CONCERNING THE NATURE AND SCOPE OF AN INVESTIGATIVE REPORT, IF SUCH A REPORT IS OBTAINED BY THE CREDITOR.

THE UNDERSIGNED JOINTLY AND SEVERALLY AGREE TO PAY ALL CHARGES MADE BY AUTHORIZED USERS OF THIS CREDIT.

X _____ X _____ DATE

OPEN	PHONE	DATE OPENED	HIGH CREDIT	PAYMENT SCHEDULE	BALANCE 6/10/10	SECURITY	L/P	H/D	HOW PAID
[illegible]	842-2757	No Record							
[illegible]	"								
PAID									

EMPLOYMENT VERIFICATION: 27 years 2000/mo by Carol Fultz

SALARY $ _____

RESIDENCE VERIFICATION (Buying or Renting): by

FURNISHED OR UNFURNISHED?

Ulta	12/98	6/02	177	0	R-1	2000 R
Sears	10/98	9/98	552	553	I-1	
Southgate	4/98	3/98	6966	0	I-1	
VC BK & Tr	7/98	7/98	6143	6143	I-1	
Macys	9/98	9/02	524	0	R-1	
Macys	11/98	9/99	456	442	R	$150 past due
	$130	1260	3190	1410	R	
Hartfields	10/98	5/99	31	0	R-	
[illegible]	6/99	1/02	—	0	R-1	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Exhibit B

CUSTOMER STATEMENT

INSTALLMENT LOAN DEPARTMENT — WESTGATE STATE BANK — DATE 1-18-79

AMOUNT APPLYING FOR $ 7450 — INTEREST $

PURPOSE NEW — INSURANCE

YEAR 77 MAKE Dodge MODEL Van — RESERVE DEPOSIT

EQUIPMENT Conversion

CASH SELLING PRICE $ 9450 — CHECK TO:

CASH DOWN PAYMENT $ 2000

TRADE ALLOWANCE $

LESS PAYOFF $

NET EQUITY $

LESS TOTAL DOWN PAYMENT $

AMOUNT TO FINANCE $ 7450 — TOTAL NOTE $

FIRST NAME PLEASE PRINT OR TYPE: George	INITIAL: M	LAST NAME: Fine Jr	☐ INDIVIDUAL ☐ JOINT	☐ MARRIED ☐ UNMARRIED ☐ SEPARATED — AGE: 69
RESIDENCE ADDRESS: 5754 Woodson Mall	AT PRESENT ADDRESS YEARS: 2 MONTHS: 6	PHONE NO: 384-7921
PREVIOUS ADDRESS: 5 The Western Prairie Village	AT PREVIOUS ADDRESS YEARS: 3 MONTHS:	NO OF DEPENDENT CHILDREN: 0
RENTING FURNISHED ☐ RENTING UNFURNISHED ☐ BUYING	LANDLORD OR MORTGAGE HOLDER & ADDRESS: Mr. Hillmann	VENDOR'S PUR. VALUE: 175 00	BALANCE
EMPLOYED BY: John Mc Intyre DBA Blue Ribbon Sports	HOW LONG: 3 1/2 years	POSITION: partner	MONTHLY INCOME: 1750 NE
COMPLETE BUSINESS ADDRESS: Fine Office Bldg OVP			OFFICE TELEPHONE: 981 5411
PREVIOUS EMPLOYER: Wheeler-Mize	HOW LONG: 5 yr	POSITION: Sales Mgr	MONTHLY INCOME: 1400
SOCIAL SECURITY NO: 501 66 1617	NAME OF BANK: OVP	☐ CHECKING ☐ SAVINGS	

IF ANOTHER INDIVIDUAL WILL BE CONTRACTUALLY LIABLE FOR ANY CREDIT GRANTED AS A RESULT OF THIS APPLICATION, OR WILL USE ANY CRED GRANTED AS A RESULT OF THIS APPLICATION, OR YOU ARE RELYING ON JOINT OWNED PROPERTY OR ANOTHER'S INCOME TO QUALIFY FOR THIS EXTENSIO OF CREDIT, PLEASE FILL OUT THE FOLLOWING PORTION OF THIS APPLICATION.

CO BORROWER FIRST, MIDDLE & LAST NAME

CO BORROWER'S EMPLOYER — POSITION — HOW LONG — SALARY

IF YOU ARE OBLIGATED TO PAY ALIMONY, CHILD SUPPORT OR MAINTENANCE, PLEASE FILL OUT THIS SECTION

AMOUNT OF ALIMONY — AMOUNT OF CHILD SUPPORT — AMOUNT OF MAINTENANCE

NAME OF PAYEE — ADDRESS OF PAYEE

ALIMONY, CHILD SUPPORT, OR SEPARATE MAINTENANCE INCOME NEED NOT BE REVEALED IF YOU DO NOT WISH TO HAVE IT CONSIDERED AS A BASIS FO REPAYING THIS OBLIGATION. ALIMONY, CHILD SUPPORT, SEPARATE MAINTENANCE RECEIVED UNDER COURT ORDER ☐ WRITTEN AGREEMENT ☐ ORA UNDERSTANDING ☐

AMOUNT OF ALIMONY — AMOUNT OF CHILD SUPPORT — AMOUNT OF MAINTENANCE

NAME OF PAYOR — ADDRESS OF PAYOR

OTHER INCOME (Optional) — MONTHLY INCOME

RELATIVE	NAME	Relationship	RELATIVE	NAME	Relationship
	STREET ADDRESS			STREET ADDRESS	
	CITY AND STATE			CITY AND STATE	

Sears 10-78 10-75 327 -0- 16 mo I
Indian Trpo 9-74 Cking
Lochin C. 9-74 Sewing
CVP 6-78
Last Inquiry New Mark 1-18-79

UVP Applied

HAVE YOU BEEN BANKRUPT IN LAST 14 YEARS, OR HAD ANY JUDGMENTS OR GARNISHMENTS AGAINST YOU IN LAST 7 YEARS ☐ YES ☐ NO

NOTICE: THE CREDITOR MAY CAUSE A CREDIT INVESTIGATION TO BE MADE CONCERNING YOUR CHARACTER, GENERAL REPUTATION, PERSONAL CHARACTERISTICS, AND MODE OF LIVING AMONG YOUR FRIENDS, NEIGHBORS, ASSOCIATES, CONSUMER REPORTING AGENCIES, AND OTHER SOURCES TO BE CONSIDERED A PART OF THIS APPLICATION. YOU HAVE THE RIGHT TO MAKE A WRITTEN REQUEST FOR A COMPLETE AND ACCURATE DISCLOSURE OF INFORMATION CONCERNING THE NATURE AND SCOPE OF AN INVESTIGATIVE REPORT, IF SUCH A REPORT IS OBTAINED BY THE CREDITOR

THE UNDERSIGNED JOINTLY AND SEVERALLY AGREE TO PAY ALL CHARGES MADE BY AUTHORIZED USERS OF THIS CREDIT

X _____ X _____ DATE

OPEN	PHONE	DATE OPENED	HIGH CREDIT	PAYMENT SCHEDULE	BALANCE B/O/P/D	SECURITY	L/P	N/D	HOW PAID
OVP	648-38[illegible]	5/78	7909 96	44/164.77	6920.34	P78 Chevy	12/19	1/15/79	-0 8[illegible]
PAID									

EMPLOYMENT VERIFICATION

SALARY $ _____

RESIDENCE VERIFICATION Buying or Renting 5/1974 3/5

Sufficient 9-73

FURNISHED OR UNFURNISHED?

[illegible] Credit	9-711	12-73	750 -	300 -		R-1
[illegible]	10-74	9-74	—	—		I-0
[illegible]	11-76	5-73	295 -	-0-		I-1
"	11-78	5-73	134 -	24 -	13 mo R	O-0
[illegible]	12-78	6-75	539 -	194 -		R-1
[illegible]	12-78	5-78	199 -	-0-	16 mos R	R
[illegible]	11-78	4-75	43 -	-0-	44 mos R	—
[illegible] Mc	10-78	8-77	633 -	114 -	14 mos R	—
[illegible] Park	1-79	4-77	6 131 -	2060		I
[illegible] Bay	11-78	6-76				R

Exhibit C

APPENDIX A-4

Title 18 U.S.C.

§ 2311. Definitions

As used in this chapter:

"Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air;

"Cattle" means one or more bulls, steers, oxen, cows, heifers, or calves, or the carcass or carcasses thereof;

"Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof;

"Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails;

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for,

receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;

"Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof;

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806; May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90-535, 82 Stat. 885.

APPENDIX A-5

Title 18 U.S.C.

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal

intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131—1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

APPENDIX A-6

Title 18 U.S.C.

§ 3237. Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and

prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

APPENDIX A-7

Title 15 U.S.C.

§ 1681. Congressional findings and statement of purpose

(a) The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, gen-

eral reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

§ 1681d. Disclosure of investigative consumer reports

(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered,

to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

(b) Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section.

APPENDIX A-8

Rule 18 Rules of Criminal Procedure

V. VENUE

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX A-9

KSA 50-701

Article 7.—FAIR CREDIT REPORTING ACT

50-701. Findings and purpose. (*a*) The legislature of the state of Kansas hereby finds and determines that:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(*b*) It is the purpose of K. S. A. 50-701 to 50-722, inclusive, and amendments thereto, to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of such sections of this act. [L. 1973, ch. 85, § 136; Jan. 1, 1974.]

50-702. Definitions and rules of construction. The following words and phrases when used in K. S. A. 50-701 to 50-722, inclusive, and amendments thereto, shall have the meanings ascribed to them in this section.

(*a*) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(*b*) The term "consumer" means an individual.

(*c*) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, or employment purposes, or other purposes authorized un-

der K. S. A. 50-703. The term does not include (1) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (2) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (3) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys that decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under K. S. A. 50-714.

(*d*) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom the consumer is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(*e*) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate com-

merce for the purpose of preparing or furnishing consumer reports.

(*f*) The term "file," when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(*g*) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(*h*) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities. [L. 1973, ch. 85, § 137; Jan. 1, 1974.]

50-705. Disclosure of investigative consumer reports. (*a*) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless

(1) It is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to the consumer's character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of the right to request the additional disclosures provided for under subsection (*b*) of this section; or

(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

(*b*) Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him or her of the disclosure required by subsection (*a*) (1) of this section, make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five (5) days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(*c*) No person may be held liable for any violation of subsection (*a*) or (*b*) of this section if that person shows by a preponderance of the evidence that at the time of the violation the person maintained reasonable procedures to assure compliance with subsection (*a*) or (*b*). [L. 1973, ch. 85, § 140; Jan. 1, 1974.]

50-718. Obtaining information under false pretenses. Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be deemed guilty of a class A misdemeanor and upon conviction thereof shall be punished in the manner provided by law. [L. 1973, ch. 85, § 153; Jan. 1, 1974.]

50-720. Penalties. Any person violating any of the provisions of K.S.A. 50-701 to 50-719, inclusive, and amendments thereto, for which penalties are not otherwise hereinbefore provided shall be deemed guilty of a class C misdemeanor and upon conviction thereof shall be punished in the manner provided by law. [L. 1973, ch. 85, § 155; Jan. 1, 1974.]

APPENDIX A-10

Kansas Statutes Annotated

8-171. Same; lost license plate, certificate of title or registration receipt; fee for duplicate. In the event that any license plate, certificate of title or registration receipt issued hereunder, shall be lost, mutilated, or shall have become illegible, the person who is entitled thereto shall make immediate application for and obtain a duplicate therefor, upon furnishing information of such fact satisfactory to the division and upon payment of the required fees: Namely, certificate of title, two dollars ($2), registration receipt, one dollar ($1), license plates, two dollars ($2). [L. 1955, ch. 62, § 6; L. 1959, ch. 46, § 11; L. 1972, ch. 22, § 1; July 1.]

APPENDIX A-11

Kansas Statutes Annotated

84-2-403 UNIFORM COMMERCIAL CODE

84-2-403. Power to transfer; good faith purchase of goods; "entrusting." (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(*a*) the transferor was deceived as to the identity of the purchaser, or

(*b*) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale," or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (article 9), bulk transfers (article 6) and documents of title (article 7). [L. 1965, ch. 564, § 65; Jan. 1, 1966.]

APPENDIX A-12

Vernons Annotated Missouri Statutes

UNIFORM COMMERCIAL CODE

400.2-403 Power to transfer—good faith purchase of goods —"entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good

faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

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(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (article 9), bulk transfers (article 6) and documents of title (article 7). (L.1963 p. 531 § 2-403)

APPENDIX A-13

Applicable Portions of Indictment in This Case

(Filed September 25, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 79-20062-01

(18 U.S.C. 51014; 2314; 371; 2)

UNITED STATES OF AMERICA

vs.

RAYMOND W. ZWEGO, JR.
WILLIAM J. WILSON

INDICTMENT

The Grand Jury charges:

* * *

Count 3

That on or about January 18, 1979, in the District of Kansas,

RAYMOND W. ZWEGO, JR.

did willfully and knowingly make, or did cause to be made, certain material false statements to the Westgate State Bank, located in Kansas City, Kansas, the deposits of which were then and are now insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank upon an application for a loan in the name of one Robert A. Helling; which statements he then well knew to be false, all of which was done in violation of 18 U.S.C. §1014 and 18 U.S.C. §2.

Count 4

That on or about January 18, 1979, in the District of Kansas,

RAYMOND W. ZWEGO, JR.

did willfully and knowingly make, or did cause to be made, certain material false statements to the Westgate State Bank, located in Kansas City, Kansas, the deposits of which were then and are now insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank upon an application for a loan in the name of one George M. Fine; which statements he then well knew to be false, all of which was done in violation of 18 U.S.C. §1014 and 18 U.S.C. §2.

* * *

Count 9

On or about February 7, 1979, in the District of Kansas,

RAYMOND W. ZWEGO, JR.

did willfully, knowingly, and with unlawful or fraudulent intent, transport or cause to be transported in interstate commerce from Missouri to Kansas, a falsely made and forged security, which security he then knew to be falsely made and forged, to-wit: a State of Kansas Department of Revenue, Division of Vehicles Application for Duplicate Title for a 1977 Dodge, VIN: B-32BE7X157136; all of which was done in violation of 18 U.S.C. §2314 and 18 U.S.C. §2.

* * *

Opposition

Office - Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-877

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND W. ZWEGO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below properly construed the term "securities" in 18 U.S.C. 2311 to include an application for a certificate of title.

2. Whether the evidence was sufficient to sustain petitioner's conviction on two counts of making false statements to a federally insured bank in applying for a loan or advance, in violation of 18 U.S.C. 1014.

3. Whether venue was proper in the United States District Court for the District of Kansas.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-877

RAYMOND W. ZWEGO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-11A) is reported at 657 F. 2d 248.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1981. A petition for rehearing was denied on September 22, 1981. The petition for a writ of certiorari was filed on October 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Kansas, petitioner was convicted on two counts of making false statements to a federally insured bank in applying for a loan or advance, in violation of 18 U.S.C. 1014 (Counts 3 and 4), and one count of

interstate transportation of a falsely made and forged security, in violation of 18 U.S.C. 2314 (Count 9). He was sentenced to consecutive terms of two years' imprisonment on Counts 3 and 4, and three years' imprisonment on Count 9. The court of appeals affirmed (Pet. App. 1A-11A).

The trial below proceeded on stipulated facts. Petitioner stipulated that on or about January 18, 1979, he telephoned the Westgate State Bank in Kansas City, Kansas from his car dealership, New Mark Motors, located in Kansas City, Missouri. Petitioner told a bank employee that he was applying for automobile financing on behalf of two customers, Robert A. Helling and George M. Fine, for whom he gave false addresses, phone numbers, and social security numbers. Petitioner also provided false information regarding Fine's place of employment. Petitioner told the bank employee that Helling was requesting a $4,900 loan to purchase a 1977 Buick Electra, and that Fine sought a $7,450 loan to purchase a 1977 Dodge van.[1] Petitioner stipulated that both Helling and Fine would testify that they did not know petitioner; that they did not request automobile financing from Westgate State Bank through New Mark Motors; and that they had never done business with petitioner or New Mark Motors (Pet. App. 14A-19A).

Around this same time, petitioner had five Dodge vans owned by Jacpad, Inc., on his car lot, which he had agreed to sell on consignment for the corporation. On February 7, 1979, petitioner instructed his bookkeeper to prepare an application for a duplicate title to one of the vans owned by

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[1]The procedure used by petitioner and the bank permitted petitioner to supply the bank with identification and credit information on a prospective customer. If the customer was found to be creditworthy by the bank, the money was forwarded to petitioner's car dealership. The customer would thereafter execute a promissory note in favor of the dealership, which note was then assigned to the bank (Pet. App. 15A).

Jacpad. Petitioner then took the completed application to his desk, where he signed the name "B.W. Jones" on behalf of Jacpad and notarized it with the name "Loren Soll." The application was sent to the Kansas Division of Motor Vehicles, and a duplicate title was issued for the van. Petitioner then submitted the Kansas duplicate title, which had been marked to indicate a transfer of title from Jacpad to New Mark Motors, to the Missouri Motor Vehicle Bureau together with a request for an original title on the van. On February 14, 1979, Missouri issued to New Mark Motors an original title on the van. Jacpad had never employed anyone by the name of "B.W. Jones" and had never transferred title to the van to New Mark Motors (Pet. App. 20A-24A).

ARGUMENT

1. Petitioner contends (Pet. 5-10) that a forged application for a duplicate title is not a "security" as that term is defined by 18 U.S.C. 2311.[2] This claim was properly rejected by the court below. As the court of appeals correctly observed (Pet. App. 6A):

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[2]Section 2311 provides in pertinent part:

> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing * * *.

> A security can be an evidence of a right of ownership. "It is the right or interest apparently represented that has value rather than the document itself." *United States* v. *Speidel,* 562 F. 2d 1129 (8th Cir.). In the present case the appellant forged an application for a duplicate certificate of title of a motor vehicle. The application does require a notarized statement that the signor owns the vehicle in question and requests a duplicate of true title. Therefore, the application presupposes that the signor is the owner of the vehicle. The clear implication of such document is that a valid title document exists but has been lost or stolen. Once the duplicate certificate of title is issued it has value as evidence of ownership of the vehicle. *Farmers Ins. Co., Inc.* v. *Schiller,* 226 Kan. 155, 597 P.2d 238.

The definition of "securities" under Section 2311 explicitly states that the term includes any "instrument or document or writing evidencing ownership of goods." The application involved in the present case required a notarized statement that the signor was the owner of the vehicle, and as such evidenced ownership of goods within the broad sweep of Section 2311. Moreover, Section 2311 expressly covers instruments evidencing a "right to subscribe to" any of the various documents described therein. Since it is undisputed that a certificate of title is a security under Section 2311, an application for a duplicate certificate of title is certainly an instrument evidencing a "right to subscribe to" a security—the certificate of title. See *United States* v. *Elliott,* 571 F. 2d 880, 907-908 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Dickson,* 462 F. 2d 184 (4th Cir.), cert. denied, 409 U.S. 876 (1972). Accordingly, the forged and fraudulently executed application

fell within the purview of Section 2311.[3] The cases cited by petitioner do not require a different result.[4]

In any event, this case does not present an issue meriting review by this Court. The present case is the only one of which we are aware in which a court has considered whether an application for a certificate of title falls within the definition of securities under Section 2311. It does not present a

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[3]This reading of Section 2311 is consistent with congressional intent. The term "securities" in Section 2311 was intended to have an expansive meaning. During consideration of Section 2311, the definition of securities was amended from a list of instruments prefaced by the phrase "securities means," to an illustrative series of examples prefaced by the phrase "securities includes." H.R. Rep. No. 1462, 73d Cong., 2d Sess. 1 (1934). It would be inconsistent with this liberal intent to restrict the language of the statute where its plain terms would appear to cover an instrument. See *United States* v. *Jackson*, 576 F. 2d 749, 755 (8th Cir.), cert. denied, 439 U.S. 828 (1978); *United States* v. *Speidel*, 562 F. 2d 1129, 1131-1132 (8th Cir. 1977), cert. denied, 435 U.S. 915 (1978); *United States* v. *Austin*, 462 F. 2d 724, 736 (10th Cir.), cert. denied, 409 U.S. 1048 (1972).

[4]In *United States* v. *Canton*, 470 F. 2d 861, 862-863 (2d Cir. 1972), the court noted that a certificate of registration was not a document evidencing ownership of a car because the certificate was never intended to be a certificate of title and need not be transferred to effect a transfer of title. In contrast, the application for a duplicate title involved in this case does evidence ownership of a vehicle.

United States v. *Sciortino*, 601 F. 2d 680, 682 (2d Cir. 1979), and *United States* v. *Simpson*, 577 F. 2d 78, 80-81 (9th Cir. 1978), are likewise irrelevant to the present situation since they involve securities that were complete and genuine at the time the forged endorsements were added. Here, however, the security was not complete without the forged endorsement of "B.W. Jones" and the fraudulent notarization.

Finally, the security in the present case is distinguishable from the blank stock share certificates in *United States* v. *Jackson*, 576 F. 2d 749, 755 (8th Cir.), cert. denied, 439 U.S. 828 (1978), which were held to be too incomplete to be considered genuine securities since they lacked sufficient information to be negotiable. Here, the forged security enabled petitioner to obtain a duplicate Kansas title and ultimately an original Missouri title.

significant question of federal law warranting consideration by this Court.

2. Petitioner further contends (Pet. 10-19) that the evidence was insufficient to sustain his conviction on two counts of making false statements to a federally insured bank in applying for a loan or advance, in violation of 18 U.S.C. 1014. This claim is not supported by the record.

The evidence clearly established that petitioner made false statements to Westgate State Bank concerning two separate loan applications—the Helling loan in the amount of $4,900 and the Fine loan in the amount of $7,450.[5] Petitioner admits that he provided the bank with information that was "not accurate" (Pet. App. 24A) regarding the two loans: he falsely stated that Fine and Helling were New Mark Motors' customers; that the two men were purchasing vehicles from New Mark Motors; and that Fine and Helling were requesting financing in the amounts of $7,450 and $4,900, respectively. Additionally, he gave false information concerning their addresses, telephone numbers, social security numbers and Fine's place of employment. This information was clearly sufficient to influence the

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[5]Petitioner's argument that he can only be convicted on one count of making false statements because all the false information was given to the bank during one telephone call is frivolous. Section 1014 has absolutely nothing to do with the manner in which the false information is communicated. The aim of the statute is to punish those who make false statements for the purpose of influencing a bank in making a loan or advance. Here petitioner fraudulently attempted to have the bank make two loans by supplying different false information in connection with each loan. Consequently, he committed two separate and distinct offenses, and the district court properly imposed consecutive sentences on the two counts.

bank's determination to make car loans under the then existing procedures used by New Mark Motors and the bank.[6]

3. Finally, there is no merit to petitioner's claim (Pet. 20-21) that venue did not lie in the District of Kansas. Proper venue for a Section 1014 violation may be either where the false statements were prepared, executed, or made, or where the offense was completed upon receipt of the false information by the bank. 18 U.S.C. 3237(a). See *United States* v. *Candella*, 487 F. 2d 1223, 1227-1228 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); *United States* v. *Ruehrup*, 333 F. 2d 641, 643-644 (7th Cir.), cert. denied, 379 U.S. 903 (1964). In the instant case the bank received and acted upon petitioner's false statements in Kansas. Thus, the offense was completed and venue was properly laid in the District of Kansas.

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[6]The only intent necessary under Section 1014 is intent to influence a bank in making a loan or advance, and this intent can be established by circumstantial evidence. *United States* v. *Madsen*, 620 F. 2d 233, 235 (10th Cir. 1980); *United States* v. *Morrow*, 537 F. 2d 120, 133 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977). Petitioner's admission of the falsity of the information provided regarding Fine and Helling (Pet. App. 24A), along with his demonstrated familiarity with the bank's established loan process (*id.* at 15A, 25A), amply support the conclusion that petitioner knowingly made the false statements with intent to influence the bank in making the loans. Furthermore, the fact that the bank's established loan process may be questionable under Kansas consumer protection law is immaterial. Kansas law did not make it impossible for the bank to make the loans at issue in this case since, in essence, the loans would have been made directly to New Mark Motors and only indirectly to the purported customers Fine and Helling, who would have executed promissory notes in favor of New Mark rather than the bank.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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